SUPREME COURT OF THE UNITED STATES

July Term, 1978

No.

78-66

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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David M. Jones, on behalf of Rose Angelino, Rebecca Berkowitz, Esther Black, Irving Black, Robert and Joyce Breading, Linda Condon, Eugene DiRe, James Hughes, Max Levit, Sarah Meltz,

Libby Mitchell, David Oser, Esther Oser, Louis Oser, David Perez, Sue Winant, Enith Zaid and Albert Zaid prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on February 23, 1978.

Opinions Below

The opinion of the District Court for the Eastern District of Pennsylvania is not reported. It is cited as Dodson v. Salvitti, No. 74-1854 (E.D.Pa. Aug. 8, 1977). It was adopted by the Third Circuit and the slip opinion is appended hereto as Appendix 3.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered on February 23, 1978, and a copy is cited at 571 F.2d 571 (3rd Cir. 1978) as a memorandum opinion. The slip opinion is appended to this petition as Appendix 5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

This litigation was initiated as an eviction action in an urban renewal area against respondents by a private landlord in State Court in the city of Philadelphia. The respondents, tenants, argued that their relocation and 5th and 14th Amendment rights had been violated and joined the Department of Housing and Urban Development (HUD) and the Philadelphia Redevelopment Authority (RDA). HUD removed the case to Federal Court where the action was ultimately settled pursuant to a Stipulation approved by the Federal Court. The tenants were to move and RDA was to try and relocate the tenants in the urban renewal area. The case was then "dismissed". Petitioners then sought to intervene. The trial judge said a hearing would be held if he ever determined to enforce the Stipulation.

The tenants violated the Stipulation by refusing to move and were evicted by Federal Court

Order.

Respondents, both black and white, then filed a new action which, in violation of the companion case rule in the Eastern District of Pennsylvania, was assigned to a new judge. Upon finding out about the new action petitioners, with some additional individuals, once again sought to intervene.

Without taking testimony or holding a hearing the Trial Court dismissed on the primary ground that petitioners had under Rule 24(a)(2) no interest in protecting their homes against diminution in value as a result of government subsidized low-income housing proposed in the settlement agreement and on the secondary ground that their action was not timely. The Trial Court acknowledged there was no adequate representation of petitioners interests. The Third Circuit affirmed.

The questions presented are:

1. Do homeowners and residents in an urban renewal area have under Rule 24(a)(2) F.R.C.P. an interest that relates "to the property or transaction which is the subject of the action" where the complaint alleges a failure of the Department of Housing and Urban Development (HUD) and the Philadelphia Redevelopment Authority (RDA) to provide permanent replacement housing, and:

(a) The complaint seeks to enjoin RDA and HUD from disposing of any land or buildings in the urban renewal area;

(b) RDA has entered into a prior stipulation (abrogated by respondents) to furnish government sponsored low-income housing in the urban renewal area;

(c) An Order of Lis Pendens has been filed against three specific lots within the urban renewal area;

(d) A consent decree has been prepared to place government sponsored low-income housing in the urban renewal area at the three locations cited in the Lis Pendens order;

(e) The respondent tenants have refused permanent relocation anywhere outside the urban renewal area; and

(f) Government sponsored low-income housing will seriously injure the value of petitioners homes in the most expensive residential sector of center city Philadelphia?

2. Have homeowners made timely intervention under Rule 24 F.R.C.P. where

(a) In 1974 they sought to intervene in an identical cause of action between the same parties and the Trial Judge in chambers advised petitioners that a Stipulation signed by him had been ar-

rived at between the parties and the case dismissed, that he did not at that time intend to take any action to enforce the Stipulation, that if he changed his mind he would notify petitioners and hear their motion to intervene;

(b) The trial court never notified petitioners, but did evict Respondents because of their refusal for some 233 days to abide by the court approved Stipulation;

(c) Another lawsuit was filed by respondents some three weeks after their eviction against the same parties involving the same issues;

(d) The action was in violation of local Rule 3 E.D.P. assigned to another trial judge;

(e) Respondents violated Rule 19 F.R.C.P. by failing to notify the Court of peti-

tioners interest; and

(f) Petitioners had no knowledge of the new lawsuit until some two and one-half years later at which time they promptly sought to intervene?

Statutes, Federal Rules and Regulations Involved

Rule 24(a)(2) of the Federal Rules of Civil Procedure reads in relevant part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by exiting parties. (emphasis added)

Rule 19 states in relevant part:

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be joined if feasible.

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if *** (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest... (emphasis added)

...

(c) Pleading Reasons for Non-Joinder

"A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined."

Statement

This litigation was initiated as an eviction action against the petitioners by their private landlord, a non-profit housing corporation entitled Octavia Hill Association. The relevant housing was in an early urban renewal area known

as Society Hill, the most expensive center city residential area in the city of Philadelphia. Respondents included by way of third party action the City of Philadelphia, The Department of Housing and Urban Development (HUD), the Philadelphia Redevelopment Authority (RDA) and certain named individuals as officials in one of those governmental entities. The respondents argued that their relocation and constitutional rights under the 5th and 14th Amendments were being disregarded.

The case was removed to the Federal District Court for the Eastern District of Pennsylvania by HUD. The case was settled on trial date October 11, 1973 pursuant to a Court endorsed Stipulation. The Stipulation mandated that the respondent tenants vacate the private housing occupied by them within thirty days for temporary accommodations to be furnished by the Philadelphia Redevelopment Authority. The Authority was then to exercise its best efforts to provide relocation housing at

707 Pine Street within the urban renewal area in question. The action against the governmental entities and their respective officers was expressly "dismissed".

The tenants had been shown numerous properties available for relocation outside of expensive Society Hill. They had refused all housing outside Society Hill.

In violation of the Court endorsed Stipulation the respondents refused for some two hundred and thirty-three days to vacate the premises pursuant to the stipulation and were ultimately evicted by Federal Court Order.

After the Stipulation had been entered into and before respondents had refused to comply with it several of the present petitioners sought to intervene to protect their economic interests against government sponsorship of low-income housing among their homes. The trial judge held a conference and advised the petitioners that he did

not at that time plan to take any action to implement the Stipulation. He stated that if he ever decided to do so, he would first hear the motion to intervene. Inasmuch as the respondents violated the Stipulation and were evicted from the premises by Order dated June 28, 1974 some 233 days later Judge Weiner took no action to enforce the contingent responsibility of the Philadelphia Redevelopment Authority to provide housing at 707 Pine Street in Society Hill.

It is uncontested in the pleadings that on July 26, 1974, three weeks after being evicted, the tenants, unknown to petitioners, filed this lawsuit on the same basic issue of relocation, again suing RDA and HUD.

In violation of the companion case rule (#3) of the Eastern District of Pennsylvania the case was assigned to a new trial judge who had not been involved in the prior dismissal or eviction because of violation of the Stipulation. Respon-

dent tenants did not notify the new trial judge of the names of the intervenors claiming an interest in the proceeding as required by Rule 19 F.R.C.P.

Respondents, both black and white, demanded permanent replacement housing and asked that HUD and RDA be enjoined from disposing of any property in Society Hill. A Lis Pendens Order was filed as to three specific sites in Society Hill and a consent decree was drafted to place housing on those three sites in Society Hill.

In November of 1976, counsel for petitioners was by happenstance advised by counsel for the Philadelphia Redevelopment Authority that some type of lawsuit was pending in Society Hill that sounded somewhat similar to that previously dismissed by Judge Weiner. Counsel for petitioners requested a copy of the pleadings and upon examination of such pleadings made known to his clients for the first time the fact of the new law-

suit. Motion to intervene was then filed on January 13, 1977 and immediately denied. A second petition to intervene was filed and again denied. On the second denial of the right to intervene the trial judge denied to those opposing low-income housing the right to intervene as defendants but specifically reserved the right of intervention to any persons as plaintiffs who belonged to the proposed class.

Appeal from the denial of the right to intervene was filed on May 19, 1977.

After hearing the Third Circuit Court of Appeals affirmed the trial court by its decision of February 23, 1978, stating that it did so "for the reasons set forth in the District Court opinion by the Honorable Donald W. VanArtsdalen, /F.Supp./ (ed. Pa. 1977)". Petition for rehearing in banc was then filed. Such petition was denied on April 10, 1978. (A-5)

The opinion (A-3) held that the petitioners had no interest in the subject matter of the litigation because the complaint allegedly did not ask that low-income housing be placed in Society Hill. A second reason given was that petitioners had not filed a timely application. The Court disregarded the pleadings as to lack of knowledge.

Reasons for Granting the Writ

The decision below should be reversed for the following reasons:

1. In a serious departure from judicial standards the lower courts erroneously held that homeowners and residents had under Rule 24(a)(2) no interest in the property or transaction which was the subject of an action to place low-income housing among their homes.

The district Court below denied the right to intervene on the grounds that the "proposed intervenors' interest does not relate 'to the property or transaction which is the subject of the action.'"

The Court's reasoning was that the homeowners and residents who sought to protect the value of their homes did not have an interest in the subject matter of the litigation because the complaint did not specifically demand relocation within the immediate confines of Society Hill where they lived. The Court stated:

> "The motion to intervene proceeds upon the assumption that the purpose of plaintiffs' lawsuit is to introduce low-income housing specifically into the Society Hill area. If this assumption was in fact true, then the proposed intervenors' interest might relate to the property which is the subject of the action and the disposition of the lawsuit might in some way affect that interest. However, upon careful review of the complaint and other relevant documents, it is apparent that such is not the purpose. As previously noted, the thrust of the complaint is that HUD and RDA violated various Federal statutes dealing with the relocation of displaced residents of the URA and plaintiffs merely seek compliance with such statutes. Therefore, while the ultimate effect of a settlement between the parties may be to locate or construct low-income housing in the western sector of Society Hill, the purpose of plaintiffs' lawsuit is not to compel HUD and RDA to construct permanent replacement housing within that specific area.

> Since this action was instituted in order to force HUD and RDA to comply with various Federal statutes, and not to compel them to construct the replacement housing in the URA, the proposed intervenors have failed to assert an interest which relates 'to the property or transaction which is the subject of the action' and have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as a right."(A-3,pp.9-10)

The lower Courts are clearly in error as to intent. First, respondents in the complaint sought to enjoin both HUD and RDA from either demolishing, conveying or otherwise disposing of any dwelling or parcels of land within Society Hill that were owned or controlled by RDA and which were potentially available for use as permanent replacement housing until such time as defendants had provided permanent replacement housing for the plaintiffs. They had also filed a Lis Pendens Order in the same litigation bearing the same case number that called for low-income housing at three specific sites in Society Hill. They had refused relocation housing outside Society Hill and had to the Court's certain knowledge drafted a consent decree to be signed by

the Court in this proceeding calling for low-income housing at the same three sites in Society Hill. That consent decree has now been signed. In addition, in the proceeding that had been dismissed by the first trial judge they had signed a Stipulation, violated by them, calling for relocation at 707 Pine Street in Society Hill.

The intent to place low-income housing in Society Hill is explicit in both Complaint, Lis Pendens Order, Consent Decree, Court endorsed Stipulation and the respondents conduct in refusing to accept relocation housing outside of Society Hill. It is respectfully submitted that in order to conclude that plaintiffs lack an interest in the subject matter of protecting their rather expensive homes from the economic impact of low-income housing because the Complaint itself did not give addresses into which relocation must take place would appear to totally ignore reality as well as those Court documents giving addresses.

Not only is it well established that a liberal standard has to be applied in favor of intervention as of right under Rule 24 F.R.C.P., Diaz v. Southern Drilling Corp., 427 F.2d 118, 126 (C.A. 5th 1970) cert. denied Trefina, A.G. v. U.S., 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed. 2d 115 (1970), but the very wording of Rule 24(a)(2) was clearly designed to look to the practical effect of litigation. In relevant part it states that there shall be intervention as of right

> "... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest..." (emphasis added)

It is clear that under the clear wording and intent of the Rule it is not controlling whether the injury was specifically pleaded for so long as the disposition might as a practical matter cause injury. Even had no intent as to location been evidenced until a consent decree was prepared, surely respondents would have had an interest in the sub-

ject matter of the litigation.

2. Not only did the Third Circuit disregard the clear purpose and intent of Rule 24(a)(2) but their decision is in irreconcilable conflict with that of the Sixth Circuit in Joseph Skilken & Co., 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (mem.), prior decision adhered to, 558 F.2d 1283 (6th Cir.)(per curiam), cert. denied. ____ U.S.____, 98 S.Ct. 611 (1977). This is the only other decision found specifically addressing the right to intervene to halt the construction of low-income housing. The facts are almost startlingly identical to those in the instant litigation. Three separate sites, as here, were proposed for low-income housing in an expensive neighborhood, as here, in the City of Toledo. The zoning would have to be changed at one of the three sites in order to erect the proposed housing as opposed to a necessary change at two sites in the instant

litigation.[1] The housing proposed in the Consent Decree is multi-family. Two of the three lots proposed for such housing, Parcels 161 and 126 are zoned R 10A which precludes the construction of multi-unit housing. The other Parcel, No. 140, is zoned R 10, which permits multi-unit housing but in order to install the proposed number of units a zoning variance for parking would probably be required. The court in Skilken observed (p. 880) that, as here, there had been no attack on the comprehensive zoning ordinance, that at p. 881:

> "(15) We live in a free society. The time is not yet arrived for the courts to strike down state zoning laws which are neutral on their face and valid when passed, in order to permit the construction at public expense of large numbers of low cost public housing units in a

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[1] The lower Courts are in error in stating that the litigation involved an attempt to install housing that complied "fully with all valid zoning, building, fire and safety codes..." (A-3, p. 14)

neighborhood where they do not belong, and where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families."

The Court then concluded that under the law of Ohio from which the action arose a citizen had a right to enjoin a zoning violation in order to avoid prejudice, stating at p. 875:

"If the Court of Common Pleas should grant the relief asked for, it would certainly deprive the plaintiff in error Rosenberg, of his rights declared under the decision in the case of Pritz v. Messer. He would be barred from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city, as this would mean an injunction against the carrying out of the judgment of a court of record, which judgment would be determinative of facts giving rise to plaintiff in errors cause of action."

The Sixth Circuit then observed, at p. 875:

"So, in the present case, like Rosenberg, the denial of the motion to intervene has barred the property owners 'from prosecuting an injunction to enforce the observance of the zoning laws as existing under the ordinances of the city....'"

It is also the law in the State of Pennsylvania that a property owner has a cause of action to enjoin a zoning violation. Blasiis v. Bartell, 18 A.2d 478 (Sup. Ct. Pa. 1941).

The Sixth Circuit then held that the right to intervene to protect against a zoning change could "...further be justified on the ground that intervention was necessary to accord the property owners due process of law guaranteed by the Fifth Amendment." Intervenors have pleaded that placing low-income housing in Society Hill as urged by plaintiffs would constitute "taking a property without just compensation as mandated by the Fifth Amendment of the Federal Constitution." (A-28). In Diaz v. Southern Drilling Corp. 427 F.2d 1118 (C.A. 5th 1970) cert. denied Trefina, A.G. v. U.S., 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed. 2d 115 (1970), this Court stated at p. 1124 that "interests in property are the most elementary type of right that Rule 24(a) is designed to protect." This

Court in Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965) stated:

> "A fundamental requirement of due process is 'the opportunity to be heard.'" Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. It is an opportunity which must (p. 876) be granted at a meaningful time and in a meaningful manner."

If intervenors are denied the right to intervene then they will have recourse, if at all, only to a collateral attack on a judgment. In the language of this Court that would not constitute a hearing at "a meaningful time and in a meaningful manner."

The Sixth Circuit decision is in total contrast to that of the Third Circuit where the lower Court stated "the argument that low-cost housing, in and of itself, would cause any legal harm or damage to petitioners is totally rejected." (A-3, p.14) In contrast, the Sixth Circuit stated, at p. 880:

> "Under this broad order all zoning laws in conflict therewith would be invalidated. Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Innocent people who labored hard all of their lives and saved their money to pruchase homes in nice residential neighborhoods, and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed. All this would be accomplished simply by an order of a federal judge, and at the expense of the taxpayers.
>
> It is submitted that Congress never vested any such power in Federal Judges." (emphasis added)

3. Disregarding the fact that petitioners had pleaded that they had no knowledge of the pending litigation and though no evidence had been taken the Courts below in a statement of startling contradiction held "arguendo" that petitioners had not timely intervened because "...the proposed intervenors in this case knew or should have known from the time this litigation was commenced that the ultimate disposition of

these proceedings might well affect the interest which they now seek to protect." (A-3, p.12) On the one hand the Court states there is no interest threatened in the complaint. In the same opinion the Court recognizes that the ultimate disposition of these proceedings might well affect the interest which the petitioners seek to protect. How inconsistent! Judicial admission? Abuse of judicial power? The language of the Court is almost identical to that contained in Rule 24(a)(2) which determines when a party has a right to intervene based on an interest in the subject matter.

4. By concluding that petitioners had or should have had knowledge of the second action from its inception the Courts below have violated the accepted standard of law in other circuits that where evidence is not taken the factual averments in a pleading must be accepted as true. This is especially compelling law where, as here, no allegation of knowledge was made by any respondent.

Though petitioners pleaded that they had no knowledge of the second lawsuit before a different judge until shortly before they filed suit on January 13, 1977, the Trial Court in effect made an erroneous finding of fact that they had knowledge for two and one-half years:

> "... the proposed intervenors in this case knew or should have known from the time that this litigation was commenced that the ultimate disposition of these proceedings might well affect the interests which they now seek to protect. Nonetheless, they chose to remain inactive and ignored this litigation until approximately two and one-half years after its commencement, long after various alternative settlement possibilities had been fully explored."

It was stated in Intervenors Answer to Memorandum of Federal Defendants in Opposition to (Renewed) Motion to Intervene as Defendants:

> "Counsel for intervenors found out about the instant litigation through a casual conversation with counsel for the Philadelphia Redevelopment Authority and immediately asked for a copy of the pleadings in order to ascertain if the matter were of importance to his clients. It was assumed that the litigation was of a sub-

> stantially different nature because otherwise it would already have been pending before the Honorable Charles Weiner. Upon receipt of a copy of the pleadings the information was immediately transferred by counsel to his client and a petition for intervention was filed within a few weeks after that time. Up until counsel's conversation with Buford Tatum, Esq., counsel assumed that if any proceedings were to be taken in the matter that counsel would be notified. It is still perplexing as to why the proceeding is not before Judge Weiner."

As previously stated, several of the current petitioners had sought to intervene in the proceeding before Judge Weiner involving the same relocation issue between the same parties. Judge Weiner had held a conference with counsel for all parties and stated that he was not going to rule on the Petition to Intervene at that time because he did not intend to take any action in the proceeding, but that if he changed his mind he would hear the Petition to Intervene before taking any action. Petitioners now know that the only additional proceeding before Judge Weiner was a Stipulation and Order dated 6/27/74 evicting the tenants (plain-

tiffs) because they had refused to comply with the former Court approved Stipulation of October 11, 1973. So far as the petitioners knew, the status was as Judge Weiner had left it at the time they had sought to intervene in the initial litigation that had been dismissed by the Judge.

In any event, it is universally accepted that factual allegations in pleadings must be accepted as true by the court unless an evidentiary hearing is granted. None was granted in the instant proceeding. Representative of many decisions supporting the general principal is that of Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960) wherein the Court discussed the standard to be applied in determining judicial latitude with respect to well pleaded allegations of fact. The Court stated:

"The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on motion to intervene, at least in the absence of sham,frivolity, and other similar objections.'...

"For the purposes of a motion to permit intervention, all allegations in the pleading, which the intervenors propose to serve where they are made part of the action, must be deemed to be true. Kaufman v. Wolfson, D.C.S.D.N.Y., 137 F.S. 479, 481" 278 F.2d at 109.

The Court then stated at p. 109:

"...Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with ultimate results on the merit."

The Sixth Circuit held the same in the Skillken case:

"Since the District Judge summarily denied the motion to intervene without a hearing and without taking evidence, we must assume that the factual allegations in the motion and in the accompanying answer are true." (p. 873)

The Seventh Circuit is also in conflict with the Third Circuit on acceptance of factual allegations.

Clark v. Sandusky, 205 F.2d 915, 918 (7th Cir. 1953).

Had plaintiffs, as required by Rule 19 F.R.C.P., presented to the Trial Court the names of the intervenors who had proposed to intervene in this matter before the first trial judge intervenors would have had knowledge at an earlier time and would have petitioned to intervene at an earlier time.

Rule 19 in relevant part is as follows:

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be joined if feasible.

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if *** (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest... (emphasis added)

...

(c) Pleading Reasons for non-Joinder

> "A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined."

The language underlined is almost identical to the "interest" provision contained in Rule 24(a)(2).

Counsel for respondents knew the names of the petitioners herein who had sought to intervene on November 9, 1973 in the same prior litigation terminated by dismissal. With that memory fresh in their minds they filed this lawsuit on behalf of the respondents without notifying the Court of the interest of the proposed intervenors, all in violation of Rule 19. Respondents, not Petitioners, are responsible for such delay as occurred.

It is logically indefensible that the Courts below denied petitioners the right to intervene as defendants on the basis of an untimely application when the very order denying intervention contained in it an express reservation of the right to inter-

vene for any additional plaintiffs. (A-2, p. 2) In other words, those desiring newly constructed low-income housing in Society Hill could still intervene. Those opposing it were, at the same point in time, untimely. The Court stated:

> "The renewed motion of plaintiffs to have this action certified and proceed as a class action is DENIED, without prejudice to any person who may be within the definition of the proposed class from joining as a party plaintiff." (A-2, p. 2)

It would appear conclusive that if it was not too late to intervene as a plaintiff, it was not too late to intervene as a defendant.

5. The Courts below sought to circumvent the Arlington Heights decision by this Court requiring intent to discriminate through zoning before a court can order a municipalities zoning changed to permit low-income housing.

By the Consent Decree process the courts below have sought to do what they could not do based upon a proper record with all interested parties participating. Zoning is being changed on two

parcels of ground without either allegation or evidence of intent to exclude or discriminate through zoning. This is in conflict not only with the Arlington Heights decision of this Court, 429 U.S. ____, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977) and Skillken by the Sixth Circuit but with the most recent Arlington Heights decision by the Seventh Circuit Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, ____ U.S.____, 98 S.Ct. 752 (1978) setting out a wide range of matters to be considered before zoning can be changed by a Federal Court. Among that range of considerations was evidence of intent, of which there is none here, and a failure on the part of the city to zone in such a way that there is land available for low-income housing. Lack of land zoned suitably for low-income housing has not been alleged. In the Society Hill area substantial lands are zoned for multi-density housing

and some 400 units of low-income housing are currently projected to be built in part in the Society Hill historic district. Several hundred more units have already been built within some six to eight blocks distance from the technical borders of the Society Hill Urban Renewal area and multiple thousands of units in the city of Philadelphia. Accommodations in existing, as opposed to newly constructed housing, have been offered to Respondents in Society Hill.

This is evidence that the Court excluded, though largely contained in official records, but the important fact is that by abuse of the Consent Decree process wherein only parties desiring to build such housing are permitted to participate in litigation the courts have changed the zoning in the city of Philadelphia in conflict with the Arlington Heights decision of this Court and the Seventh Circuit as well as Skillken in the Sixth Circuit. HUD is in the

business of installing low-income housing.

The City of Philadelphia has been threatened by HUD by letter of May 13, 1977 with substantial loss of Federal funds if it does not install low-income housing. In the same breath or letter HUD, erroneously joined as defendant, has strongly urged low-income housing in Society Hill. Society Hill voters have also consistantly voted against the current Mayor of Philadelphia. The Respondents stand to gain housing in one of America's most expensive residential neighborhoods at very substantial public expense. The only people who have an interest in asserting the law as it has been written are the petitioners and they have been denied any voice.

6. For the reasons just discussed, because all parties permitted to participate in the litigation favor the low-income housing in Society Hill, a consent decree is being wrongly utilized to bring to bear the power of a Federal district

court order entered in a proceeding where there is no case or controversy. The Courts below acknowledge that petitioners interest is not represented. (A-3, p. 13)

7. By utilizing the Consent Decree along with exclusion of all opposition voices the Courts below have sought to circumvent both congressional and regulatory intent by placing low-income housing in a luxury sector of the city of Philadelphia. Congress has stated that the Nation's housing programs are to meet essential needs such as "decent, safe and sanitary dwellings for families of low-income." Section 1 of the United States Housing Act of 1937, 42 U.S.C. § 1401 (1970). HUD has rightly, in its regulations, sought to implement the non-luxury policy. Section 8 housing as proposed in the instant ligitation is constrained as follows:

> "Fair Market Rent. (a) The rent, includ-
> utilities (except telephone), ranges and
> refrigerators, parking, and all maintenance,

> management and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities and sound architectural design meeting the objectives of the HUD Minimum Property Standards." 24 C.F.R. 880.102, p. 415.

Land alone in Society Hill is so expensive as to make a mockery of the phrase "modest (non-luxury)" housing.

8. By precluding petitioners right to intervene the Courts below have denied to them the right to plead res ajudicata and other violations of the law.

9. Other law being violated by the consent decree without opposition is HUD's own regulation:

> "A contract may be for an initial term of not more than five years, with an option solely in the owner to renew for additional terms of not more than five years each...."

The Court decree in blatent disregard of the above regulation mandates that the developer take pursuant to a covenant requiring that the properties

be used for "low and moderate" income housing "for the term of twenty years".

Conclusion

With HUD moving to achieve economic integration across the nation and with everyone but the citizens of the threatened area represented, the question of the right of the citizens to participate in litigation to attempt to protect the value of their homes and the quality of their lives is going to arise again and again.

HUD should not be allowed, erroneously posing as a defendant, through an abuse of the consent decree process to circumvent the law as written by this Court, Congress, HUD's own regulations and Sister Circuits. A consent degree should not be used to do what the courts can not do under the law.

With activist housing suits being brought, with cities being threatened with dimunition of Federal funding if they do not comply with HUD's

current version of the law and with citizens whose property values are to be destroyed by the results of this activity being excluded from participation in the judicial process, there will be no one to support the law as written. The Consent Decree arrived at without participation of all interested parties is worse than a pig in a poke, it is action by the court that sees no evidence, hears no evidence and does evil because the issues have never been developed.

Petitioners respectfully pray that this Honorable Court reverse the Third Circuit Court of Appeals in order that a judicial decree in this matter might be based on the law and not on the self-conceived interests of like minded parties without opposition.

Respectfully submitted,

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Attorney for
Petitioners

OLAN B. LOWREY
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Philadelphia, Pa. 19122
Of Counsel

SUPREME COURT OF THE UNITED STATES

July term, 1978

No. 78-66

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MABLE DODSON, et al.

v. : CIVIL ACTION
No. 74-1854

AUGUSTINE L. SALVITTI, et al.

O R D E R

AND NOW, this 7th day of February, 1977, the motion of Rose Angelino, et al., filed January 13, 1977, to intervene as parties defendant, is DENIED AND DISMISSED.

BY THE COURT:

_____
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MABLE DODSON, et al.

v. : CIVIL ACTION
: NO. 74-1854

AUGUSTINE L. SALVITTI, et al.

O R D E R

AND NOW, this 19th day of April, 1977, the renewed motion to intervene, filed by Olan B. Lowrey, Esq., in behalf of approximately twenty individual persons alleged to be residents of "Society Hill" is DENIED and DISMISSED. The renewed motion of plaintiffs to have this action certified and proceed as a class action is DENIED, without prejudice to any person who may be within the definition of the proposed class from joining as a party plaintiff.

BY THE COURT:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MABEL DODSON, et al. CIVIL ACTION

v.

AUGUSTINE SALVITTI, et al. : No. 74-1854

MEMORANDUM

VanARTSDALEN, J.

Proposed intervenors claim a right to intervene in this litigation pursuant to Fed. R. Civ. P. 24(a)(2) which requires "an interest relating to the property or transaction which is the subject of the action." They contend that they have a substantial interest in the protection of their property from alleged economic loss resulting from the introduction of subsidized low income housing into their neighborhood. The

motion to intervene was denied. The proposed intervenors' interest does not relate "to the property or transaction which is the subject of the action."

Plaintiffs are persons who have been displaced from their residences in the Washington Square East Urban Renewal Area (URA) of Philadelphia. Plaintiffs seek declaratory and equitable relief that will compel the United States Department of Housing and Urban Development (HUD) and the Redevelopment Authority of the City of Philadelphia (RDA) to provide or make available comparable replacement housing which plaintiffs contend they are entitled to under the National Housing Act, 42 U.S.C. §§ 1441 et seq., the Housing and Urban Development Act of 1968, 42 U.S.C. §§ 1469 et. seq., and the Uniform Relocation Assistance and Real Property Acquisition

Policies Act of 1970, 42 U.S.C. §§ 4601 et seq. Plaintiffs' complaint further alleges various violations of the Civil Rights Act, 42 U.S.C. §§ 1983, 2000d and 3601 et seq. and asserts claims under the equal protection and due process clauses of the fifth and fourteenth amendments to the constitution.

The relief sought by plaintiffs, as set forth in their complaint, includes:

> (1) a declaration that defendants have a duty to provide permanent replacement housing for the plaintiffs in a manner which will promote racial integration.
>
> (2) a declaration that defendants have failed to perform their aforesaid duty.
>
> (3) an injunction prohibiting RDA from demolishing, conveying, or otherwise disposing of any dwelling units or parcels of land within the Washington Square East Urban Renewal Area which are potentially available for permanent replacement housing until such time as defendants have provided permanent replacement housing for the plaintiffs.

(4) an injunction prohibiting HUD from providing federal financial assistance to RDA for the purpose of disposing of any dwelling units or parcels of land, as described above.

(5) an order compelling defendants to develop, implement and, if necessary, finance a plan or program for construction of permanent replacement housing.

The parties to this suit are believed to be nearing the finality of settlement negotiations whereby the defendants would agree insofar as possible within their statutory authority to cause the construction of low income subsidized housing in the western sector of Society Hill (URA) to be used as replacement housing for the plaintiffs. Precipitated by this proposed settlement, on January 13, 1977, twenty individuals moved to intervene as defendants in this action pursuant to Fed. R. Civ. P. 24(a) and on February 7, 1977 this court denied such motion. The same individuals renewed their motion to intervene and this motion likewise was denied on

April 17, 1977.

The proposed intervenors claim to have a sufficient interest in the lawsuit so as to entitle them to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) states:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The interest necessary to warrant intervention as of right has been held to be a "direct, substantial, legally protectable interest in the proceedings." Hobson v. Hansen, 44 F.R.D. 18, 24 (D.D.C. 1968).

The proposed intervenors, residents of the Society Hill area, assert that most of them own property in close proximity to one or more of

the sites currently being considered for government subsidized low income housing and seek to protect their economic interest in the value of their homes.[1] It is their contention that the introduction of government sponsored low income housing into the neighborhood would seriously impair both the quality of life and the real estate value of neighborhood property. They seek to intervene in order, apparently, to insure that the litigation proceeds without compromise and with all defenses asserted.

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[1] The stated purpose of this attempted intervention is to allow the proposed intervenors, members of the Society Hill community, the right to actively participate in the continuing settlement negotiations. Apparently, these individuals wish to interject their objections to the proposed settlement and express their support for certain other alternatives to the construction of low income housing in this vicinity. The fact that they may be opposed to this particular settlement or in favor of some alternative plan is simply not a sufficient basis for permitting their intervention.

The motion to intervene proceeds upon the assumption that the purpose of plaintiffs' lawsuit is to introduce low income housing specifically into the Society Hill area. If this assumption was in fact true, then the proposed intervenors' interest might relate to the property which is the subject of the action and the disposition of the lawsuit might in some way effect that interest. However, upon careful review of the complaint and other relevant documents, it is apparent that such is not the purpose. As previously noted, the thrust of the complaint is that HUD and RDA violated various federal statutes dealing with the relocation of displaced residents of the URA and plaintiffs merely seek compliance with such statutes.[2] Therefore, while the ultimate effect of a settlement between the parties may be to locate or

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[2] Plaintiffs do, however, seek to enjoin HUD

construct low income housing in the western sector of Society Hill, the purpose of plaintiffs' lawsuit is not to compel HUD and RDA to construct permanent replacement housing within that specific area.

Since this action was instituted in order to force HUD and RDA to comply with various federal statutes, and not to compel them to construct replacement housing in the URA, the proposed intervenors have failed to assert an interest which relates "to the property or transaction which is the subject of the action" and have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention

---

and RDA from demolishing, conveying or otherwise disposing of any dwelling units or parcels of land within the URA which are owned or controlled by RDA and which are potentially available for use as permanent replacement housing until such time as defendants have provided permanent replacement housing for the plaintiffs.

as of right.[3]

Assuming arguendo that the practical effect of the disposition of this particular litigation would be sufficient for intervention as of right, the intervenors' motion is untimely. Most recently the Supreme Court stated, in considering the appropriate dispostion of a motion to intervene pursuant to Rule 24(a)(2), that "(t)he critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly. . . .[4] Cf. NAACP v. New York, 413 U.S. 345,366."

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3 See East Powelton Concerned Residents v. United States Department of Housing and Urban Development, 69 F.R.D. 392 (E.D. Pa. 1975) (homeowners' association lacked sufficient interest to entitle it to intervene as of right), for a comparable rationale.

4 The District Court for the Eastern District of Pennsylvania, citing NAACP v. New York, 413 U.S. 345, 365-368 (1973), stated that "(w)hen the motion is advanced at such a late stage in the proceedings, the test for timeliness is whether

United Air Lines Inc. v. McDonald, 45 U.S.L.W. 4760, 4762-63 (U.S. June 20, 1977). Unlike the intervenor in United Air Lines who had reason to believe that her interests were being adequately protected throughout the litigation and who filed her motion to intervene promptly upon it becoming apparent that her interests would no longer be protected, the proposed intervenors in this case knew or should have known from the time this litigation was commenced that the ultimate disposition of these proceedings might well effect the interests which they now seek to protect. Nonetheless, they chose to remain inactive and ignored this litigation until approximately two and one-half years after its commencement, long after various alternative settlement possibilities had been

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the proposed intervenors knew or should have known of the pendency of the action at an earlier time, and should therefore have acted to protect their interests sooner...." Mack v. General Electric Co., 63 F.R.D. 368, 369 (E.D.Pa. 1974), aff'd, 535 F.2d 1247 (3d Cir. 1976).

fully explored. Finally, any claim on the part of these proposed intervenors that their dilatory action in regard to this litigation was the result of their belief that their claimed interests were being protected by defendants is untenable. There is simply no duty on the part of any of the defendants to protect against the alleged effect that the settlement agreement will have upon the interests claimed by these proposed intervenors.

The only interest that petitioners assert is an apprehension that if the outcome of the litigation, whether by settlement or otherwise, results eventually in the construction of any new low cost housing in or near the vicinity of petitioners' various places of abode, it will somehow adversely effect their "quality of life" and depreciate real estate values as to those petitioners who may own their own homes. The present litigation

in no way seeks the construction of any type of housing that does not comply fully with all valid zoning, building, fire and safety codes, rules and regulations. The argument that low cost housing, in and of itself, would cause any legal harm or damage to petitioners is totally rejected. The plain, unambiguous objective of petitioners is to prevent new low cost housing in their neighborhood. The present litigation seeks only compliance with statutory mandates of Congress by governmental and municipal bodies.

For all of the foregoing reasons, to the extent that the petition might be deemed a petition for permissive intervention under Fed. R. Civ. P. 24(b), as a discretionary intervention, the petition was likewise denied.

Because I found no legal merit in petitioners' attempt to intervene, and no legal harm to petitioners irrespective of the outcome of the

litigation, the petition filed by the same petitioners to stay all proceedings, including any continuing settlement negotiations, pending outcome of the appeal from my order denying intervention, was also denied.

This memorandum is filed for the purpose of explaining the denial of the petition to intervene and to stay proceedings pending appeal of such denial.

BY THE COURT:

Donald W. VanArtsdalen
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1840

MABLE DODSON, FLORENCE HAYES, DOROTHY MILLER, EVELYN POWELL, HENRY STROUD, ESMOND AND LILLIAN TILLEY, HELEN WEBER on behalf of themselves and all others similarly situated

vs.

AUGUSTINE L. SALVITTI, Executive Director, MICHAEL J. LONERGAN, Chairman, JEAN R. BELLET, MARGARET C. GORDON, ROBERT H. GRAY, and PAUL M. LAWSON, members of the Redevelopment Authority of the City of Philadelphia, THE REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA: JAMES T. LYNN, Secretary, THEODORE R. ROBB, Regional Director, DOUGLAS E. CHAFFIN, Acting Philadelphia Area Director, of the United States Department of Housing and Urban Development, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

proposed intervenors Rose Angelino, Rebecca Berkowitz, Esther Black, Irving Black, Robert and Joyce Breading, Linda Condon, Eugene DiRe, James Hughes, Max Levit, Sarah Meltz, Libby Mitchell, David Oser, Esther Oser, Louis Oser,

David Perez, Sue Wanink, Edith Zaid and Albert Zaid,

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil Action No. 74-1854)

Argued
February 22, 1978
Before: ALDISERT, VAN DUSEN and WEIS,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, and for the reasons set forth in the district court opinion by The Honorable Donald W. VanArtsdalen, ____ F.Supp.____ (E.D.Pa. 1977), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

R. J. Aldisert
Circuit Judge

Attest:

Thomas F. Quinn, Clerk

DATED: Feb. 23 1978

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 77-1840

MABLE DODSON, et al.

vs.

AUGUSTINE L. SALVITTI, etc., et al.,

Proposed intervenors Rose Angelino, et al., Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, Circuit Judges.

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Aldisert
Judge

Dated: April 10, 1978

SELECTED DOCKET ENTRIES

State Court Action, Common Pleas Court of Philadelphia County, No. 897, November Term, 1972, Judge Hirsh.

Octavia Hill Ass'n., Inc. v. Dodson v. Redevelopment Authority of Philadelphia, HUD, et al.

10/10/72	Complaint Filed by Octavia Association for Eviction
8/ 9/73	Judgement in Ejectment
9/12/73	Add'l. defts. Redevelopment Authority, Lennox L. Moak, Jean R. Bellet, Robert H. Grey, Paul N. Lawson and Augustine L. Salvitti, is dismissed.

First Federal Court Action, Eastern District of Pennsylvania, C.A. No. 73-1598, Judge Weiner

Octavia Hill Ass'n., Inc. v. Dodson v. Redevelopment Authority of Philadelphia, HUD, et al.

7/ 6/73 Petition for Removal Filed by HUD

10/10/73 Arg. re: Deft's. Motion to Dismiss - C.A.V.

10/11/73 Non-Jury Trial-Case called for Trial - all 6 cases will be settled - Stipulation to be filed.

10/17/73 Transcript of 10/11/73 containing Stipulation and Order that this action is dismissed, filed (C.A. 73-1594).

11/ 9/73 Motion of Paul Baucholtz, et al. to intervene as parties pltf. filed.

6/28/74 Stipulation and Order of Court dtd. 6/28/74 re: delivery of possession of premises 623 Lombard St., Phila., Pa., etc., filed (C.A. 73-1594)

No. 78-66

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROSE ANGELINO, ET AL., PETITIONERS

v.

MABEL DODSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
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JAMES W. MOORMAN,
Assistant Attorney General,

CARL STRASS,
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Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-66

ROSE ANGELINO, ET AL., PETITIONERS

v.

MABEL DODSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

By order of February 23, 1978 (Pet. App. A-4, pp. 16-18), *sub nom. Dodson* v. *Salvitti*, 571 F. 2d 571 (table), the court of appeals affirmed and adopted the unreported memorandum opinion of the district court. The district court's memorandum opinion is reproduced as Petitioners' Appendix A-3.

JURISDICTION

Judgment of the court of appeals was entered on February 23, 1978 (Pet. App. A-4, pp. 17-18). A timely petition for rehearing was denied by the court of appeals on April 10, 1978 (Pet. App. A-5, p. 19). The petition for writ of certiorari was filed on July 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, residents of an urban renewal area, should have been permitted to intervene as of right under Rule 24(a)(2), Fed. R. Civ. P., in an action which was brought by displaced persons against the United States Department of Housing and Urban Development and the Philadelphia Redevelopment Authority to compel those agencies to provide them with permanent replacement housing.

STATEMENT

Petitioners, current residents of an area of Philadelphia known as "Society Hill," seek to intervene under Rule 24(a)(2), Fed. R. Civ.,[1] in an action brought by former residents of an urban renewal area to compel the United States Department of Housing and Urban Development (HUD) and the Philadelphia Redevelopment Authority (RDA) to provide permanent replacement housing.

Several of those former residents were defendants in an action brought in 1972, *Octavia Hill Association* v. *Charles Miller, et al.*,[2] in which the owner of a block of houses in the Washington Square East Urban Renewal Area (URA) sought to evict tenants in order to rehabilitate housing on the block under a contract with RDA. HUD and RDA were named as additional

[1]Rule 24(a)(2) reads:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[2]Civil Action Nos. 73-1594, 73-1595, 73-1596, 73-1597, 73-1598, 73-1599 (E.D. Pa.).

defendants in the *Octavia Hill* case, but were dismissed as part of a stipulation agreement entered into on October 11, 1973. That agreement provided that the tenant-defendants would be housed temporarily in RDA properties and that RDA would actively support the rehabilitation of property within the URA as a "permanent relocation resource" for the tenants. At that point, after the parties had reached a settlement, petitioners sought to intervene in that action, but were refused permission by the trial judge (Pet. 3). Petitioners' concern then, as now, was with the allegedly detrimental effect which government subsidized housing would have on their neighborhood.[3]

On July 26, 1974, former residents of the Washington Square East Urban Renewal Area filed the present action, alleging that HUD and RDA had violated several housing statutes,[4] certain Civil Rights Acts[5] and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution by failing to provide adequate permanent replacement housing to persons displaced from their homes in the Washington Square East Urban Renewal Area as part of urban renewal activities. The former residents requested that HUD and RDA be ordered to provide permanent replacement housing in accordance with their statutory duty and "in a manner affirmatively to promote racial integration" (Complaint, pp. 10-11). The former residents also requested the court

[3]The Washington Square East Urban Renewal Area has roughly the same boundaries as "Society Hill."

[4]Act of July 15, 1949, 63 Stat. 413, 42 U.S.C. 1441, *et seq.*; Act of August 1, 1968, 82 Stat. 518, 42 U.S.C. 1469, *et seq.*; Act of January 2, 1971, 84 Stat. 1894, 42 U.S.C. 4601, *et seq.*

[5]Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. 1983; Act of July 2, 1964, 78 Stat. 252, 42 U.S.C. 2000d; Act of April 11, 1968, 82 Stat. 81, 42 U.S.C. 3601, *et seq.*

to enjoin the demolition or other disposal of housing or land within the Washington Square East Urban Renewal Area, which was owned by RDA and could be used for permanent replacement housing, until defendants had provided permanent replacement housing for the former residents.

The case did not go to trial; instead, the parties entered into negotiations resulting in a consent decree which was approved by the court on September 16, 1977.[6] On January 13, 1977, before the consent decree was approved and while the parties were negotiating, petitioners moved to intervene in the action under Rule 24(a)(2). The district court, by order filed February 8, 1977, denied this motion. On March 4, 1977, petitioners filed a second motion which they now call a renewed motion to intervene. Petitioners, proposed intervenors, attempted in their second motion to claim an interest relating to the property or transaction which was the subject of the action since the location of government-subsidized housing in their neighborhood would depress property values ([Renewed] Motion to Intervene as Defendants, p. 2). They also claimed they were so situated that the disposition of the action might as a practical matter impair or impede their ability to protect their interest, and that they were not adequately represented by the existing defendants. In their answer to the complaint attached to their motions to intervene, petitioners pleaded no defense not already pleaded by the existing defendants. The proposed intervenors claimed they were concerned that RDA and/or HUD were to willing to compromise with the plaintiffs,

[6]The consent decree provides that HUD and RDA will arrange for the construction of 14 to 18 dwelling units for the plaintiffs in the Washington Square East Urban Renewal Area.

who wished to live in their neighborhood in subsidized housing ([Renewed] Motion to Intervene as Defendant, p. 3).

The district judge denied the second motion to intervene by order of April 19, 1977 (Pet. App. A-2, p. 2). By memorandum opinion filed August 5, 1977 (Pet. App. A-3, pp. 3-15), the court concluded that the proposed intervenors had no interest which related to the property or transaction which was the subject of the action because the former residents' complaint sought only that HUD and RDA comply with federal statutes dealing with relocation of displaced persons, not that they should be provided with permanent housing in the specific area of "Society Hill" (Pet. App. A-3, p. 9). The court alternatively concluded that, even assuming, *arguendo*, that the proposed intervenors met the requirements of Rule 24(a)(2) as to interest, the motion was not timely made as required by the Rule. The district judge stated that the proposed intervenors "knew or should have known" from the time the action began that the ultimate disposition of the case might well affect their interest, yet they remained on the sidelines for about 2½ years after the action was commenced (Pet. App. A-3, p. 12).

The Court of Appeals for the Third Circuit affirmed the district court's denial of intervention, adopting the district judge's opinion (571 F. 2d 571 (table).) The proposed intervenors' Petition for Rehearing was also denied.

ARGUMENT

This case presents no issue warranting review by this Court. The decision does not conflict with the decision of any other court of appeals or of this Court. The court of appeals neither departed from the accepted and usual course of judicial proceedings nor decided an important question of federal law requiring the intervention of this Court. On the contrary, the court of appeals applied

established law to the facts of this case. As to any challenges petitioners make to findings of fact by the district court, this Court has often stated that it is not "a court for correction of errors in fact finding," and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

The district court must enjoy some discretion in determining whether the requirements for intervention have been met. *Rios* v. *Enterprise Association Steamfitters Local Union No. 638 of U.A.*, 520 F. 2d 352, 355 (C.A. 2). Applying Rule 24(a)(2) to the facts of this case, one cannot say the trial court erred in denying petitioners the right to intervene in this litigation. Petitioners failed (1) to establish the necessary interest relating to this action, (2) to demonstrate that they were so situated that the disposition of the action would as a practical matter impair or impede their ability to protect any interest they might have, (3) to show that they were inadequately represented by the existing parties, and (4) to timely move for intervention.

1. Petitioners claimed no interest "relating to the property or transaction" which was the subject of the former residents' action, within the meaning of Rule 24(a)(2). Simply stated, the former residents demanded in their complaint adequate permanent replacement housing, not housing in the particular neighborhood, "Society Hill." And even if, as a practical matter, housing was demanded in petitioners' neighborhood, petitioners did not have the required "significantly protectable interest" to entitle them to intervene. *Donaldson* v. *United States*, 400 U.S. 517, 531. This interest must be a "direct, substantial, legally protectable interest in the proceedings." *Diaz* v. *Southern Drilling Corp.*, 427 F. 2d

1118, 1124 (C.A. 5), certiorari denied *sub nom. Trefina, A.G.* v. *United States*, 400 U.S. 878. Petitioners' only alleged interest in this litigation was the possibility that several units of government subsidized housing would be placed in their neighborhood and that this might have an adverse effect on property values and the "quality of [petitioners'] lives" (Pet. 39). Such an interest is too contingent and indirect to qualify under the Rule. See *Air Lines Stewards, Etc., Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101, 105 (C.A. 7); *Old Colony Trust Co.* v. *Penrose Industries Corp.*, 387 F. 2d 939 (C.A. 3). Even assuming a decrease in their property values, petitioners would have no cause of action for a "taking" of their property. *Sayre* v. *City of Cleveland*, 493 F. 2d 64, 69 (C.A. 6), certiorari denied, 419 U.S. 837. And allegations as to damage to "quality of life" might well conflict with the policies of the Civil Rights Acts. In the circumstances, the courts below did not err in finding the interest asserted by petitioners insufficient under the Rule. See *United States* v. *Alpine Land and Reservoir Company*, 431 F. 2d 763, 768-769 (C.A. 9), certiorari denied, 401 U.S. 909.[7]

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[7]Petitioners make much of *Joseph Skillken and Co.* v. *City of Toledo*, 528 F. 2d 867 (C.A. 6), vacated and remanded, 429 U.S. 1068, prior decision adhered to *Metropolitan, Etc.* v. *Village of Arlington Heights*, 558 F. 2d 1283 (C.A. 7) (Pet. 20-25), a case superficially similar in some respects to petitioners', but inapposite. *Skillken* involved the right of neighboring landowners to intervene in an action by minority persons and a company constructing low-income housing to require members of the city council to rezone an area where the suit might have resulted in nullification of a zoning ordinance on which property owners relied in purchasing and developing their properties. In the present case, the district judge noted that "[t]he present litigation in no way seeks the construction of any type of housing that does not comply fully with all valid zoning, building, fire and safety codes, rules and regulations" (Pet. App. A-3, pp. 13-14). The plaintiffs here did not bring an action to

2. Petitioners are not "so situated that the disposition of the action may as a practical matter impair or impede" petitioners' ability to protect whatever interest they may have. The consent decree in this case will not have the kind of *stare decisis* effect found sufficient under Rule 24(a)(2) in cases such as *Atlantis Development Corp.* v. *United States*, 379 F. 2d 818 (C.A. 5). Compare *Air Lines Stewards, Etc., Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101, 106 (C.A. 7); *United States* v. *Allegheny Ludlum Industries, Inc.*, 517 F. 2d 826, 845-846 (C.A. 5) (consent decrees unlikely to have *stare decisis* effects measurably adverse to proposed intervenors). The "mere inconvenience" of having to litigate separately is not sufficient under the Rule. *Blake* v. *Pallan*, 554 F. 2d 947, 954 (C.A. 9).

That petitioners' ability to protect their interest has not been impaired or impeded as a practical matter by the denial of intervention is clear, as petitioners' counsel has

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rezone any property, and even if the construction of the requested housing involves some minor zoning changes, a fact not established by petitioners, it is doubtful that petitioners could bring an action under Pennsylvania law to challenge these. See *Burne* v. *Kearney*, 424 Pa. 29, 225 A.2d 892, 894; *Hollearn* v. *Silverman*, 338 Pa. 346, 12 A.2d 292, 294. See also *Eastlake* v. *Forest City Enterprises*, 426 U.S. 668, 674 (note 8). Compare relevant Ohio law, discussed in *Skillken, supra*, 528 F. 2d at 874-875. Moreover, in *Skillken*, rezoning of a particular neighborhood was requested, whereas in the present case permanent replacement housing (and any zoning changes this might involve) was demanded in connection with no particular neighborhood. Finally, *Skillken* involved what the court of appeals termed a "broad order" converting the nature of the case to that of an action "to desegregate the residential areas of the entire City of Toledo," with the municipal defendants ordered to submit to the court within 90 days a comprehensive desegregation plan. 528 F. 2d at 880. The present case involves no such issues, which may have influenced the court of appeals' treatment of the proposed intervenors' claim in *Skillken*.

already brought an action against HUD and RDA challenging the consent decree on behalf of other residents of "Society Hill." *Society Hill Civic Association* v. *Harris*, E.D. Pa., Civil Action No. 77-3102. Petitioners are free to intervene in that action, and their timely motion to intervene presumably would be denied only if the district court found that their interests were already adequately represented by the plaintiffs in that action, in which case petitioners would have no cause to complain.

3. It is not clear at all that petitioners' interests were not "adequately represented by existing parties." Rule 24(a)(2).[8] A presumption of adequate representation generally arises when the representative is a governmental body charged by law with representing the interests of the absentee. *Commonwealth of Pennsylvania* v. v. *Rizzo*, 530 F. 2d 501, 505 (C.A. 3), certiorari denied *sub nom. Fire Officers Union* v. *Pennsylvania*, 426 U.S. 921. See also *Sam Fox Pub. Co.* v. *United States, 366 U.S. 683 (dictum)*. The burden of showing inadequate representation under the Rule is on the proposed intervenor. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538. Representation is adequate "if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty." *United States* v. *Board of School Commissioners, Indianapolis, Ind.*, 466 F. 2d 573, 575 (C.A. 7) (denial of intervention upheld where proposed intervenors claimed that by entering into stipulations and a consent decree the

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[8]The district judge found that there was "no duty on the part of any of the defendants to protect against the alleged effect that a settlement will have on the interests claimed" by petitioners (Pet. App. A-3, p. 13).

board had failed to assert their interests as vigorously and effectively as proposed intervenors could have). "[A]ny case, even the most vigorously defended, may culminate in a consent decree." *Commonwealth of Pennsylvania* v. *Rizzo, supra,* 530 F. 2d at 505. "That [petitioners] would have been less prone to agree to the facts and would have taken a different view of the applicable law" does not mean that the defendants in the present case failed to represent their interests in this litigation. *United States* v. *Board of School Commissioners, Indianapolis, Ind.*, supra, 466 F. 2d at 575. Petitioners have not shown collusion on the part of HUD and RDA with the plaintiffs (Pet. 33-36). Nor is it clear that defendants' interest in providing housing and promoting the redevelopment of Philadelphia is necessarily adverse to petitioners. The defendants raised essentially the same defenses against the plaintiffs as proposed intervenors raised in their own answer. *Commonwealth of Virginia* v. *Westinghouse Electric Corp.*, 542 F. 2d 214, 216 (C.A. 4).

4. Petitioners' motions to intervene were not timely, as required by Rule 24(a)(2). Timeliness under the Rule is to be determined from all the circumstances, and a court's ruling on timeliness will be disturbed only for abuse of discretion. *National Association for the Advancement of Colored people, et al.* v. *New York,* 413 U.S. 345, 366.

The most important factor in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay. *McDonald* v. *E.J. Lavino Co.*, 430 F. 2d 1065, 1073 (C.A. 5). In this case, petitioners sought to intervene in an action in which they claimed to have an interest approximately 2½ years after it was brought, at a time when the parties were negotiating a settlement.[9] To

[9]Petitioners likewise sought to intervenue in the earlier *Octavia Hill* litigation after the parties and reached an agreement (Pet. 11).

permit petitioners to raise their objections at that late hour would obviously have prejudiced the existing parties who sought to end years of litigation through settlement. The district judge found that petitioners "knew *or should have known*" from the time this litigation began that the ultimate disposition of the case might affect their asserted interests (emphasis added) (Pet. App. A-3, p. 12). Considering the alleged importance of this proceeding to petitioners, the publicity surrounding the litigation, and petitioners' attempted intervention in the earlier *Octavia Hill* action, it is plain that this finding did not constitute an abuse of discretion. *National Association for the advancement of Colored People, et al.* v. *New York, supra*, 413 U.S. at 366-367.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.

DOJ-1978-09

SUPREME COURT OF THE UNITED STATES

July Term, 1978

No. 78-66

ROSE ANGELINO, et al.,

Petitioners,

v.

MABLE DODSON, THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR REHEARING

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Attorney for Petitioners

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CITATIONS

Cases:

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Proof of Service

I, Olan B. Lowrey, attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 27th day of October, 1978, I served copies of the foregoing Petition for Rehearing of the Order Denying the Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On the United States, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Walter S. Batty, Esquire, Assistant United States Attorney for the Eastern District of Pennsylvania, at Room 3310, United States Courthouse, Philadelphia, Pennsylvania 19106, and by mailing three copies in a duly addressed envelope, with first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Philadelphia Redevelopment Authority, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Thomas D. Watkins, Counsel at the offices of the Philadelphia Redevelopment Authority, 7th floor, Legal Department, Philadelphia, Pennsylvania 19107.

3. On Mable Dodson, Dorothy Miller, Florence Hayes, Evelyn Powell and Henry Stroud, respondents, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Harold R. Berk, Community Legal Services, Sylvania House, Juniper & Locust Streets, Philadelphia, Pennsylvania 19107.

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Introduction

Petitioners respectfully pray that the Court reconsider its order of October 2, 1978 denying their petition for a Writ of Certiorari to the

United States Court of Appeals for the Third Circuit.

Petitioners were denied the right to intervene to protect their economic interest in their homes from the negative impact of rezoning in order to place higher density low-income housing in among their homes. Their petition to intervene was denied on the grounds that inasmuch as the pleadings did not specify that the relocation housing sought must be in the urban renewal area where petitioners lived petitioners had no interest under Rule 24(a)(2) of the Federal Rules of Civil Procedure and in the alternative that although the petitioners had duly pleaded lack of knowledge of the litigation until such time as they sought to intervene their petition was untimely. Without evidence or allegation of knowledge by any nominal defendant the Courts below concluded that petitioners should have had knowledge of a lawsuit attended by no publicity and no notice to petitioners required by Rule 19, F.R.C.P. At the time of denial of the right to intervene the Trial Court had before it a Consent Decree specifying three

addresses in the community among petitioners homes where the low-income housing was proposed and a lis pendens notice as to those three sites had been initially filed of record pursuant to the petition. The Third Circuit Court of Appeals adopted the Trial Court opinion.

Grounds for Petition

As grounds for this petition, petitioners respectfully request this Court's consideration of the following substantial matters that were not presented in the Petition for Certiorari:

1. Since Petition for Certiorari was filed in the instant case the Fourth Circuit has joined the Sixth and Eighth Circuits as being in conflict with the Third Circuit with respect to the right of homeowners to intervene in litigation to protect their homes from economic injury through government sponsored construction.

2. The decision of the Third Circuit in the instant case is in direct conflict with a prior decision of the Third Circuit with respect to the issue

of standing to protect the economic value of homes from the threat of construction of low-income housing.

3. To deny petitioners the right to intervene will result in a violation of Article 3, Section 2 of the United States Constitution because without petitioners' participation in the litigation there is no bona fide defendant and therefore no case or controversy essential to the jurisdiction of the Federal courts.

Argument

1. Since Petition for Certiorari was made in the instant case the Fourth Circuit has joined the Sixth and Eighth Circuits as being in conflict with the Third Circuit with respect to the right of homeowners to intervene in litigation to protect their homes from economic injury through government sponsored construction.

The Fourth Circuit decision of Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. 1978) recognized standing for property owners to

intervene as of right under F.R.C.P. 24(a)(2) to protect themselves against rezoning for high density housing. The economic injury asserted was a possible loss of potable water as a result of construction of a planned residential development involving rezoning to permit, as in the instant case, greater density in the neighborhood. The intervenors had petitioned nine days after a court order was entered approving the rezoning. The Trial Court had denied the right to intervene but was reversed by the Fourth Circuit in part on the grounds that the Trial Judge had in effect participated actively in concert with the opposition by bringing pressure on the government officials upon whom the petitioners had relied. The Fourth Circuit concluded that the petitioners had had no way of knowing that this would be done and therefore that their petition to intervene to protect their property interests nine days after judgment was entered was appropriate. The Court specifically addressed the issue of interest under 24(a)(2) and concluded that fear by the residents and property owners that the planned

community would endanger the purity and potableness of the water in the county reservoir was a sufficient interest:

> "The facts demonstrate incontrovertibly that appellants possessed, as just observed in referring to Rule 24(a)(2), such "an interest relating to the property or transaction" in suit that "the disposition of the action" could "impair or impede" their ability to protect their concern. Admittedly, the two corporations were composed of upwards of 1000 residents or property owners in the County who, not without reason, feared that the "planned community" would endanger the purity and potableness of the water in the Albemarle County Reservoir."

It will be recalled that the Sixth Circuit in Joseph Skilken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), vacated and remanded, 429 U.S. 1068 (mem.) prior decision adhered to, 558 F.2d 1283 (6th Cir.), cert. denied, ____ U.S. ____, 98 S.Ct. 611 (1977) under a set of facts almost identical to those of the instant case involving rezoning for low-income housing it was held that citizens had a right to intervene under Rule 24 F.R.C.P. In Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) the Eighth Circuit relied on Skilken

in holding that homeowners had standing under 24(a)(2) F.R.C.P. to intervene to protect their economic interest in their homes from the feared injury that might result from the erection of an abortion clinic in the neighborhood. The Court stated:

> "In order to prevent what they view as an incipient erosion of their property values, the applicants must participate in this litigation, and must be given the opportunity to present their views to the Court in their endeavor to uphold the ordinance as a legitimate and constitutional exercise of municipal power." (p. 869)

2. The decision of the Third Circuit in the instant case is in direct conflict with a prior decision of the Third Circuit with respect to the issue of standing to protect the economic value of homes from the threat of construction of low-income housing.

In determining that petitioners had no legal interest under Rule 24(a)(2) that might be affected by the introduction of low-income housing into petitioners' community the Third Circuit is totally disregarding its own legal precedent respecting standing established in Shannon v. United States Department of Housing & Urban Development, 436 F.2d 809

(3rd Cir. 1970). In Shannon the issue was standing to initiate a lawsuit to stop low-income housing from being placed in the neighborhood. Both white and black residents of a Philadelphia neighborhood in an urban renewal area brought suit to challenge HUD's revision of an urban renewal plan which contemplated owner occupied dwellings. The revision called for government sponsored rental dwellings. The only differences between the facts in Shannon and those in the instant case are that in Shannon some of the persons seeking standing were black. The issue was initial standing rather than the interest that might be affected under Rule 24(a)(2) and in the instant case the zoning is being changed.

The first two factors are regarded as immaterial under the law and the third is an additional reason for granting the right to intervene. Regrettably, it is quite possible that the standing recognized in Shannon did in fact bear on the race of the complaintants. It is difficult to otherwise en-

vision why in the instant litigation individuals making exactly the same claims of desiring to protect their homes from economic loss resulting from government low-income housing have been said to have no legally protectable interest. The reason given by the courts below to the effect that the complaint did not call for housing in Society Hill would appear to be specious at best. The accompanying lis pendens notice with the same caption and court number and the ultimate consent decree did give addresses within Society Hill.

In Shannon the basis for injury in fact was the allegation that the concentration of lower income black residents in the rent supplement project in their neighborhood would "adversely effect not only their investments in homes and businesses, but even the very quality of their daily lives." (p. 818) This language is essentially identical to that pleaded by petitioners in the instant case in their Motion to Intervene as Defendants:

> 'The interest petitioners seek to protect "is an economic interest in the value

> of their homes. It is an unfortunate though well-established fact that government subsidized housing is extremely injurious to property values wherever it is placed."

In Shannon the Third Circuit reasoned that

> "[t]he plaintiffs here, perhaps more than the displaced and relocated former residents or the potential occupants of new housing are vitally affe ted by the adequacy of the particular program of community improvement of a residential community with decent homes and a suitable living environment which they seek to challenge. (p. 818)"

In the instant case, the Third Circuit in contradiction of the principles stated above denied the right to intervene of those homeowners in the community where the low-income housing was and is proposed while it simultaneously held open in the same order the right of any additional plaintiffs to seek to intervene in order to establish their right to housing in the community. Rather than recognize that white homeowners had perhaps a greater right than those seeking to return to the community to live in low-income housing the Court held they had no right though Rule 24(a)(2) of the Federal Rules of Civil Procedure clearly states

that there is such a right ·

> "...when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest...."

The Court below acknowledged that the applicants' interest was not adequately represented by existing parties, totally disregarded the well-pleaded statement to the effect that applicants had no knowledge of the proceeding until such time as they sought to intervene and thereby denied to petitioners in what can only be described as a severe miscarriage of justice the right to seek to protect their homes from the debilitating effects of zoning changes to achieve greater density as well as the negative effects of government sponsored low-income housing. It is respectfully submitted that there is no difference in substance between Shannon and the existing case. The refusal of the courts, below to abide by fundamental principles of law incline petitioners to respectfully suggest that the

courts are involved in their own version of an affirmative action program, that the refusal to follow the Shannon decision stems in part from the fact that none of the petitioners are minority individuals.

If the judicial system is to maintain the respect that is essential to its effective functioning, the judges on all benches must comply with the law as written. In the instant litigation it is quite possible that petitioners could have lost on the merits, that the zoning could be changed because of a showing of bias, that the Court might construe a violation of the Fair Housing Act so as to legally justify changing of the zoning to impose low-income housing in a fine community. But, here the lower courts have by refusing to abide by their own precedent denied to citizens their day in court to litigate the obvious and significant issues presented.

In both cases it is stressed that we are dealing with an urban renewal area. In both cases some of those to allegedly benefit from the government sponsored low-income housing had formerly lived in the neighborhood. In both cases the interest sought to

be protected was an economic interest in the homes of the individuals. There is no material distinction.

In Resident Advisory Board v. Rizzo, 425 F.Supp. 987 (E.D.Pa. 1976), aff'd as modified, 564 F.2d 126 (3rd Cir. 1977) cert. denied, 435 U.S. 908 (1978) citizens protesting economic loss to result from low-income housing in their communtiy were permitted to intervene without comment.

3. To deny petitioners the right to intervene will result in a violation of Article 3, Section 2 of the United States Constitution because without petitioners participation in the litigation there is no bona fide defendant and therefore no case or controversy essential to the jurisdiction of the Federal Courts.

In this litigation there is no case or controversy. The primary parties are those individuals seeking government sponsored low-income housing for themselves, the Department of Housing and Urban Development and the City of Philadelphia. Neither the Department of Housing and Urban Development nor the City of Philadelphia are bona fide defendants in the litigation.

The City of Philadelphia is dependent upon the Federal structure for funding through the Community Development Program sponsored by the Department of Housing and Urban Development. The Department of Housing and Urban Development in turn is actively sponsoring low-income housing in communities in the City of Philadelphia and in the instant case has specifically sought to induce the City of Philadelphia to permit low-income housing to be placed in Society Hill. The form of the inducement is in the context of a threat to terminate or diminish funding to the City of Philadelphia in the event that every effort is not made to achieve HUD's stated goals.

In a letter written by the Department of Housing and Urban Development on May 13 of 1977 at a time when it was posing as a defendant in this lawsuit and purporting to represent the interests of homeowners concerned about the value of their homes and the quality of their life HUD wrote a letter to Frank Rizzo, Mayor of the City of Philadelphia, containing the following threat and the following suggestion as

to how to avoid that threat being carried out. The threat read:

> "The City should be aware that failure to take all necessary steps within its powers to produce low-income housing outside areas of minority concentration or failure to implement the housing plan pursuant to the City's commitment could lead to a reduction of funds during this community development block grant program year or a loss of funds for the next year." (p. 2)

The suggestion as to how to avoid the threat read:

> "We encourage the City to continue to move ahead with the subsidized units in the Washington Square West NDP area (Society Hill) related to the settling of the Mable Dodson case and to help provide housing choice for low-income families." (p. 3) (emphasis added)

It is believed axiomatic that where there is no bona fide defense there is no case or controversy under Article 3, Section 2 of the Constitution and therefore no grounds for the Court to act. This has been an established principle from the date of the Constitution and was given judicial recognition and reinforcement as early as Lord v. Veazie, 49 U.S. (8 How.) 251 (1850). In Lord Veazie had sold the stock in a corporation to Lord and covenanted that the corporation had the right to use the Penobscot River for

navigation. An action on the covenant was then docketed by consent of both parties. The issue was whether the covenant was enforceable. The Supreme Court found that the contract for the sale of the stock was made for the purpose of instituting a lawsuit and there was no real dispute between the parties because their interest was identical. The Court stated:

> "...the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit, who had no knowledge of it while it was pending in the Circuit Court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought the question upon a statement of facts agreed on between themselves without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment pro forma entered by their mutual consent without any actual judicial decision by the court." (p. 254)

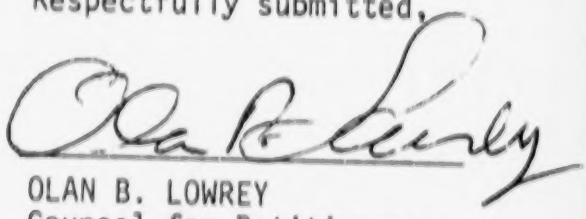
The Court then continued:

> "The objection in the case before us is... that the plaintiff and the defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided

in the manner that both of the parties to this suit desire it to be." (p. 255)

No language could have been written more directly related and appropriate to the instant litigation where the only parties with an adverse interest had no knowledge until they sought to intervene and where they and they alone possessed an interest adverse to that held jointly by the plaintiffs along with the misaligned Department of Housing and Urban Development and City of Philadelphia.

Respectfully submitted,



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